



IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN RE GGP, INC. STOCKHOLDER
LITIGATION

No. 202, 2021

Court Below: Court of Chancery of the
State of Delaware

Cons. C.A. No. 2018-0267-JRS

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TABLE OF CONTENTS

	<u>Page Nos.</u>
TABLE OF CITATIONS.....	iii
NATURE OF PROCEEDINGS	1
1. The Court of Chancery’s Confusing and Inconsistent Holdings on Appraisal Rights.....	1
a. The Erroneous Holding that the Dividend Was Not Part of the Merger	2
b. The Erroneous and Confusing Holdings Concerning the Effect of the Dividend in an Appraisal Proceeding	5
2. The Court of Chancery’s Erroneous Holding that the Proxy Complied with Section 262(d)(1) and Delaware Law	7
SUMMARY OF ARGUMENT.....	11
STATEMENT OF FACTS.....	13
ARGUMENT	15
I. THE COURT OF CHANCERY ERRED IN HOLDING THAT SECTION 262 AND DELAWARE LAW PERMITTED USING THE DIVIDEND AS A MEANS OF EVISCERATING APPRAISAL RIGHTS.....	15
A. Question Presented	15
B. Scope of Review	15
C. Merits of Argument	15
1. Section 262 Is Not “An Enabling Statute” But a Mandatory Statutory Right	15
2. The Court of Chancery Misinterpreted <i>Crawford</i> and Ignored the Step-Transaction Doctrine in Holding that the Dividend Was Not Part of the Merger.....	17
3. The Court of Chancery’s Ruling that the Deal Structure Did Not Alter Appraisal Rights Was Legal Error	21
a. The Dividend Altered the Appraisal Process	21

b.	The Dividend Effectively Eliminated Appraisal Rights for Most Stockholders and Rendered Appraisal Not Viable.....	24
c.	The Court of Chancery’s Holding that Stockholders Could Receive the Dividend but Seek Appraisal with Respect to the Combined Consideration Was Legal Error	28
4.	The Court of Chancery Committed Legal Error by Dismissing the Appraisal Fiduciary Claim.....	31
II.	THE COURT OF CHANCERY ERRED IN ITS MISINTERPRETATION AND MISAPPLICATION OF 8 <i>DEL. C.</i> § 262(D)(1) AND DELAWARE DISCLOSURE LAW	34
A.	Question Presented	34
B.	Scope of Review	34
C.	Merits of Argument	34
1.	The Notice of Appraisal Did Not Satisfy the Requirements of Section 262(d)(1) and Delaware Disclosure Duties.....	34
2.	The Proxy Clearly and Repeatedly Said Appraisal Rights Applied Only to the Merger and Cash Merger Consideration.....	37
3.	The Court of Chancery’s Erroneous Interpretation of Section 262(d)(1).....	39
	CONCLUSION	43

EXHIBITS:

<i>In re GGP, Inc. Stockholder Litig.</i> , Cons. C.A. No. 2018-0267-JRS Memorandum Opinion dated May 25, 2021	Exhibit A
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TABLE OF CITATIONS

	<u>Page No(s).</u>
CASES	
<i>Alabama Byproducts Corp. v. Cede & Co.</i> , 657 A.2d 254 (Del. 1995).....	6, 30
<i>Andrew and Suzanne Schwartz 2000 Family Tr. v. AM Apparel Hldgs., Inc.</i> , 2008 WL 2877804 (Del. Ch. July 28, 2008)	40
<i>In re: Appraisal of Dell Inc.</i> , 2016 WL 6069017 (Del. Ch. Oct. 17, 2016).....	27
<i>Arnold v. Soc’y for Sav. Bancorp, Inc.</i> , 650 A.2d 1270 (Del. 1994).....	41
<i>Aspen Advisors LLC v. United Artists Theatre Co.</i> , 843 A.2d 697 (Del. Ch. 2004)	30
<i>Bäcker v. Palisades Growth Cap. II, LP</i> , 246 A.3d 81 (Del. 2021).....	32
<i>Bank of New York Mellon Tr. Co., N.A. v. Liberty Media Corp.</i> , 29 A.3d 225 (Del. 2011).....	24
<i>Berger v. Pubco Corp.</i> , 976 A.2d 132 (Del. 2009).....	9, 12, 35
<i>In re Best Lock Corp. S’holder Litig.</i> , 845 A.2d 1057 (Del. Ch. 2001)	28
<i>Brigade Leveraged Cap. Structures Fund Ltd. v. Stillwater Mining Co.</i> , 240 A.3d 3 (Del. 2020).....	22
<i>Cede & Co. v. Technicolor, Inc.</i> , 542 A.2d 1182 (Del. 1988).....	29
<i>Coughlan v. NXP B.V.</i> , 2011 WL 5299491 (Del. Ch. Nov. 4, 2011).....	24
<i>Dell, Inc. v. Magnetar Glob. Event Driven Master Fund Ltd.</i> , 177 A.3d 1 (Del. 2017).....	22, 23, 27

<i>In re Delphi Fin. Grp. S'holder Litig.</i> , 2012 WL 729232 (Del. Ch. Mar. 6, 2012)	32
<i>Fir Tree Value Master Fund, LP v. Jarden Corp.</i> , 236 A.3d 313 (Del. 2020).....	22
<i>Gatz v. Ponsoldt</i> , 925 A.2d 1265 (Del. 2007).....	19, 24
<i>In re GGP, Inc. S'holder Litig.</i> , 2021 WL 2102326 (Del. Ch. May 25, 2021)	passim
<i>Gilliland v. Motorola, Inc.</i> , 859 A.2d 80 (Del. Ch. 2004)	35
<i>Grimes v. Alteon Inc.</i> , 804 A.2d 256 (Del. 2002).....	16
<i>Jackson v. Turnbull</i> , 1994 WL 174668 (Del. Ch. Feb. 8, 1994).....	16, 35
<i>In re JCC Holding Co., Inc.</i> , 843 A.2d 713 (Del. Ch. 2003)	30
<i>Kaye v. Pantone, Inc.</i> , 395 A.2d 369 (Del. Ch. 1978)	29
<i>Louisiana Municipal Police Employees Retirement System v. Crawford</i> , 918 A.2d 1172 (Del. Ch. 2007)	passim
<i>In the Matter of the Appraisal of Enstar Corp.</i> , 604 A.2d 404 (Del. 1992).....	16, 29
<i>M.G. Bancorporation v. Le Beau</i> , 737 A.2d 513 (Del. 1999).....	passim
<i>Mehta v. Mobile Posse, Inc.</i> , 2019 WL 2025231 (Del. Ch. May 8, 2019)	35, 36, 40
<i>Morrison v. Berry</i> , 191 A.3d 268 (Del. 2018).....	41

<i>Nebel v. Sw. Bancorp, Inc.</i> , 1995 WL 405750 (Del. Ch. July 5, 1995)	35
<i>Noddings Inv. Grp., Inc. v. Capstar Commc'n, Inc.</i> , 1999 WL 182568 (Del. Ch. Mar. 24, 1999)	24
<i>Raab v. Villager Indus., Inc.</i> , 355 A.2d 888 (Del. 1976).....	40
<i>Schnell v. Chris-Craft Indus., Inc.</i> , 285 A.2d 437 (Del. 1971).....	32
<i>Shell Petroleum, Inc. v. Smith</i> , 606 A.2d 112 (Del. 1992).....	34
<i>Smith v. Shell Petrol., Inc.</i> , 1990 WL 186446 (Del. Ch. Nov. 26, 1990).....	30
<i>Twin Bridges Ltd. P'ship v. Draper</i> , 2007 WL 2744609 (Del. Ch. Sept. 14, 2007).....	24
<i>Zirn v. VLI Corp.</i> , 681 A.2d 1050 (Del. 1996).....	8, 41
STATUTES	
8 <i>Del. C.</i> § 102(b)(7)	32
8 <i>Del. C.</i> § 157	16
8 <i>Del. C.</i> § 251(b)(6)	18
8 <i>Del. C.</i> § 262.....	passim
OTHER AUTHORITIES	
Leo E. Strine, Jr., <i>The Delaware Way: How We Do Corporate Law and Some of the New Challenges We (and Europe) Face</i> , 30 <i>Del. J. Corp. L.</i> 673 (2005).....	16
1 R. Franklin Balotti & Jesse A. Finkelstein, <i>The Delaware Law of Corporations & Business Organizations</i> (4th ed., 2021).....	passim

Robert S. Saunders et al., 2 *Folk on the Delaware General Corporation Law* (7th ed. 2021).....passim

NATURE OF PROCEEDINGS

This appeal of a portion of the Court of Chancery’s May 25, 2021 opinion and order dismissing this action on behalf of former stockholders of GGP, Inc. (“GGP” or the “Company”)¹ raises questions of first impression in this Court regarding interpretation of 8 *Del. C.* § 262, the Delaware appraisal statute. This Court has not previously considered whether a huge dividend, conditioned on and paid after the merger along with the merger consideration, was part of a merger for purposes of an appraisal. Nor has this Court considered the implications of such a dividend on appraisal rights, the notice of appraisal required by Section 262(d)(1), and the appraisal process.

1. The Court of Chancery’s Confusing and Inconsistent Holdings on Appraisal Rights

Plaintiffs’ complaint contained detailed allegations that the two pronged structure of the transaction violated Section 262 because the Company paid a dividend (the “Dividend”) that removed almost all value underlying the GGP shares, thereby denying the GGP stockholders the right to seek appraisal of the full pre-transaction value of their shares.² Plaintiffs further alleged that the description of appraisal rights in the June 27, 2018 Joint Proxy Statement/Prospectus (the

¹ *In re GGP, Inc. S’holder Litig.*, 2021 WL 2102326, at *30-33 (Del. Ch. May 25, 2021).

² *Id.* at *30; Consolidated Verified Third Amended Stockholder Class Action Complaint (“Complaint”) ¶¶ 209-28; 302-07.

“Proxy”) did not satisfy Section 262(d)(1)’s requirements for a notice of appraisal rights and Delaware disclosure law.³ Following oral argument on Defendants’ motions to dismiss, the Court of Chancery requested and received supplemental briefing on the appraisal issues.⁴ The Court of Chancery dismissed both the claim that the transaction structure denied the GGP stockholders their full appraisal rights under Section 262 and that Defendants’ notice of appraisal in the Proxy did not satisfy Section 262(d)(1) and Delaware disclosure law.

Plaintiffs’ appeal asserts that it was legal error for the Court of Chancery to dismiss these claims because it is reasonably conceivable that Plaintiffs could prove a set of facts establishing that (i) the Dividend was part of the August 28, 2018 merger, (the “Merger”), (ii) the GGP stockholders were entitled to appraisal of the pre-Dividend value of their shares, and (iii) the Proxy did not satisfy Section 262(d)(1) and Delaware disclosure law.

a. The Erroneous Holding that the Dividend Was Not Part of the Merger

The Court of Chancery held that Defendants did not violate Section 262 by paying 98.5% of the consideration for GGP’s shares as a dividend of cash and

³ *GGP*, 2021 WL 2102326, at *32; Complaint ¶¶ 215-28; 231-33; 303.

⁴ Letter dated December 31, 2020, from VC Slights to counsel requesting supplemental briefing regarding Defendants’ Motions to Dismiss the Third Amended Complaint (Trans. ID 66219962). Defendants’ letter brief in response, dated February 18, 2021 (Trans. ID 66350680), is cited herein as “*DSB ___*.”

securities (previously defined as the “Dividend”) and only 1.5% as cash consideration in the Merger.⁵

Plaintiffs contended that the Dividend and Merger were one transaction.⁶ They alleged facts, many not contestable, supporting their contention that the Dividend was part of the Merger.⁷ They pointed to *Crawford* and the step-transaction doctrine as legal support that the Dividend and Merger were a single transaction. In short, Plaintiffs showed it was reasonably conceivable that they could prove facts at trial that would establish that the Dividend and Merger were one transaction and, therefore, the limitation of appraisal rights to just the Merger was in violation of Section 262.

The lower court ignored the step-transaction doctrine and instead agreed with Defendants that Section 262 “says nothing of a right to an appraisal of the fairness of the merger consideration more generally.”⁸ It found there was not “any statutory text restricting a buyer’s use of a pre-closing dividend in advance of a merger as a means to move consideration from the transacting parties to stockholders.”⁹ Thus,

⁵ *GGP*, 2021 WL 2102326, at *31. The Dividend involved an election to receive either (i) \$14.33 in cash plus 0.376 shares or units or (ii) 0.986 units or shares. The merger consideration was only \$0.312 in cash.

⁶ *Id.* at *30.

⁷ Complaint ¶¶ 212-14, 219-20, 222.

⁸ *GGP*, 2021 WL 2102326, at *31.

⁹ *Id.*

the Court of Chancery held that the Dividend and Merger were separate transactions and, therefore, appraisal rights were limited to the post-Dividend fair value of the shares when the Merger closed. There was no appraisal right as to the Dividend because the Dividend was not part of the Merger but only part of “the merger consideration more generally.”¹⁰

The lower court said there was no “case law addressing how a pre-closing dividend would (or should) be treated in an appraisal proceeding.”¹¹ However, *Louisiana Municipal Police Employees Retirement System v. Crawford*, 918 A.2d 1172, 1191-92 (Del. Ch. 2007) held that a special dividend conditioned on a merger is merger consideration for the stockholders’ shares under Section 262. The Court of Chancery’s holding that appraisal rights could only apply to the Merger is inconsistent with *Crawford’s* holding that a special dividend conditioned on a merger is part of the merger and should be reversed. That holding is also inconsistent with Delaware’s step-transaction doctrine which requires that the Dividend and Merger be treated as one transaction. The Court of Chancery’s failure to address that doctrine is reversible error.

¹⁰ *Id.*

¹¹ *Id.*

b. The Erroneous and Confusing Holdings Concerning the Effect of the Dividend in an Appraisal Proceeding

After holding that the Dividend was not part of the Merger, the Court of Chancery nevertheless ruled that the Dividend would “qualify as a ‘relevant factor’ in the court’s assessment of the fair value of a GGP stockholder’s shares.”¹² The lower court ruled that Section 262(h) enables the appraisal court “to view the Transaction as a whole in the course of determining GGP’s fair value at the time of the merger.”¹³ This holding is inconsistent with the lower court’s prior holding that the Dividend is not part of the Merger.¹⁴

The court below next held that “a GGP shareholder seeking appraisal could argue and the Court could determine under Section 262 that the Pre-Closing Dividend plus the closing consideration undervalued the dissenting stockholder’s shares.”¹⁵ This holding contradicts the lower court’s earlier ruling that the Dividend was not part of the Merger, and therefore, there was no right to an appraisal of shares on a pre-Dividend basis.¹⁶

¹² *Id.*

¹³ *Id.*

¹⁴ *See id.* at *30.

¹⁵ *Id.* at *32. The lower court’s formulation implicitly recognizes that GGP, consistent with the Proxy and Merger Agreement, would argue that the Dividend was not part of the Merger and the fair value determination should be made on a post-Dividend basis.

¹⁶ *Id.* at *30-31.

The court below acknowledged established Delaware law that “a dissenting stockholder must forego all merger consideration in order to perfect her appraisal challenge.”¹⁷ However, the Court of Chancery erroneously held that GGP stockholders seeking appraisal would have been able to accept the Dividend without losing their appraisal rights.¹⁸

The Court of Chancery also erroneously concluded that whether the Dividend was part of the Merger would not affect an appraisal proceeding:

The fundamental issue raised for resolution in the appraisal proceeding would remain unchanged: did the stockholder receive fair value for its proportionate share of the corporation upon closing?¹⁹

However, whether the Dividend was part of the Merger would change the fundamental issue in an appraisal proceeding. If the Dividend was part of the Merger, then the fair value determination would be based on the going concern value of GGP as it was before the Dividend. If, as the Court of Chancery held, the Dividend was not part of the Merger, the fair value determination would be based on GGP as it stood “upon closing” after the Dividend and only determine whether the “closing consideration” (*i.e.* the \$0.312 per share cash merger consideration)

¹⁷ *GGP*, 2021 WL 2102326, at *32; *see e.g., Alabama Byproducts Corp. v. Cede & Co.*, 657 A.2d 254, 262 (Del. 1995).

¹⁸ *GGP*, 2021 WL 2102326, at *32.

¹⁹ *Id.*

undervalued the GGP shares as GGP existed post-Dividend. Moreover, whether the Dividend was part of the merger consideration would affect other aspects of appraisal rights, including whether the *de minimis* exception of Section 262(g) would even permit an appraisal action to be maintained. Limitation of appraisal rights to the minimal cash merger consideration would also render appraisal an unattractive financial proposition and prohibitively expensive.

2. The Court of Chancery’s Erroneous Holding that the Proxy Complied with Section 262(d)(1) and Delaware Law

The Court of Chancery also made an erroneous holding that the notice of appraisal rights contained in the Proxy complied with Section 262(d)(1) and Delaware law.²⁰ The Proxy told the GGP stockholders that: (i) their appraisal rights were “solely in connection with the merger;” (ii) stockholders perfecting appraisal rights “shall not receive the merger consideration;” and (iii) an appraisal award would be “in lieu of” and “may be greater than, the same as or less than the per share merger consideration.”²¹ In short, the notice of appraisal rights said *the Dividend was not* part of the merger consideration and that appraisal rights *would not include the Dividend* but only the \$0.312 cash merger consideration. The Court of Chancery

²⁰ *Id.* at *32-33.

²¹ A43, A60, A363, A366 [Proxy at 15, 32, 335, 338]. The Proxy in the letter to stockholders and on p. vi defined “per share merger consideration” to be the cash consideration received in the merger, excluding “the aggregate cash dividend amount.” A12.

admitted that GGP's Proxy advised that appraisal rights only implicated the cash merger consideration, not the Dividend:

[T]he options available to its stockholders: either (a) accept the post-dividend payment to be made at closing, or (b) forfeit that payment and demand appraisal for a payment equal to the "fair value" of the stockholder's GGP shares.²²

The Court of Chancery erred by holding that the Proxy's affirmative representation that any appraisal proceeding would be limited to the Merger and the cash merger consideration provided proper notice of appraisal rights under Section 262(d)(1). The court below held Defendants had no obligation to provide legal advice and that the stockholders should have sought out legal advice "which necessarily would have entailed evaluating the role of the Pre-Closing Dividend on a hypothetical appraisal proceeding."²³ However, Section 262(d)(1) required the Defendants to provide legal advice that appraisal rights were available and Delaware law mandates that such advice be complete and accurate. Defendants' Proxy provided partial and incorrect legal advice instead. Therefore, Defendants violated Section 262(d)(1) and Delaware law by failing to provide a complete and accurate summary of the available appraisal rights.²⁴ The Defendants were well aware of

²² *GGP*, 2021 WL 2102326, at *32.

²³ *Id.*

²⁴ 8 *Del. C.* § 262(d)(1); *Zirn v. VLI Corp.*, 681 A.2d 1050, 1053, 1056-57 (Del. 1996).

Crawford, and it was misleading to declare unequivocally that appraisal would only apply to the Merger and the miniscule cash merger consideration and would exclude the Dividend. Plaintiffs’ allegations showing that it was reasonably conceivable that, the Dividend and Merger were one transaction, also make it reasonably conceivable that Plaintiffs could prove the notice of appraisal in the Proxy both failed to satisfy Section 262(d)(1) and was materially misleading and incomplete partial disclosure.

The Court of Chancery admitted that “the Proxy could have been more clearly drafted” and that “the stockholders may have been better served had Defendants capitalized the defined term ‘merger consideration’ and tightened up its definition.”²⁵ Yet, the Court of Chancery sustained the misleading and incomplete notice of appraisal as “sufficient.”²⁶ However, strict compliance with Section 262(d)(1)’s requirement for notice of available appraisal rights and Delaware law required full and accurate disclosure of information material to the stockholders’ decision whether to seek appraisal.²⁷

The Court of Chancery’s opinion tells Delaware corporations they can structure mergers to avoid or severely limit appraisal rights and provide incomplete

²⁵ *GGP*, 2021 WL 210326, at *33.

²⁶ *Id.*

²⁷ *Berger v. Pubco Corp.*, 976 A.2d 132, 135-36 & n.5 (Del. 2009).

and inaccurate notice and disclosure concerning appraisal rights. This Court should decide whether or not that is to be Delaware law.

SUMMARY OF ARGUMENT

1. The Court of Chancery committed legal error by holding that Defendants' structuring of the transaction as a huge Dividend and a Merger with minimal cash merger consideration did not violate the right of GGP stockholders under Section 262 to an appraisal of the fair value of their shares. It was also reversible error for the Court to ignore the step-transaction doctrine. The lower court further erred in its interpretation of *Crawford*, which correctly established that a special dividend can be part of a merger. The Court of Chancery's holding suggesting that the Dividend could be considered in an appraisal contradicts its holding that the Dividend was separate from the Merger. As a matter of Delaware law, the Court of Chancery's theory that stockholders could receive the Dividend yet argue in an appraisal that the Dividend be included in the fair value determination is wrong. The lower court's holding that exclusion of the Dividend would not alter appraisal rights or affect the efficacy of an appraisal proceeding is also incorrect as a matter of law.

2. The Court of Chancery erred by holding that the Proxy satisfied the notice of appraisal requirements of 8 *Del C.* § 262(d)(1) and Delaware law. The notice of appraisal rights was required to inform the GGP stockholders of the appraisal rights that were available and to provide "all information material to

shareholders deciding whether or not to seek appraisal.”²⁸ The Court of Chancery held that though the Dividend was not part of the Merger it was nevertheless a relevant factor under 8 *Del C.* § 262(h) in determining the fair value of GGP shares in an appraisal.²⁹ The Proxy repeatedly indicated that appraisal rights were only available as to the Merger and cash merger consideration received in the Merger and would not include the Dividend.³⁰ Therefore, Defendants violated § 262(d)(1) and Delaware law, entitling Plaintiffs and the class to a quasi-appraisal or other remedy.³¹

²⁸ 8 *Del. C.* § 262(d)(1); *Berger*, 976 A.2d at 134.

²⁹ *GGP*, 2021 WL 2102326, at *31. *See also Crawford*, 918 A.2d at 1191-92.

³⁰ A43, A60, A363, A366 [Proxy at 15, 32, 335, 338].

³¹ *Berger*, 976 A.2d at 138-45.

STATEMENT OF FACTS

Few facts are pertinent in this limited appeal and those are largely set forth elsewhere in support of Plaintiffs' arguments. A brief summary will suffice.

Defendants Brookfield Property Partners, L.P. and its affiliates ("Brookfield") acquired the 64.7% of GGP's common stock Brookfield did not already own for 61% cash and 39% in equity in two Brookfield affiliates.³² The deal consideration was paid in two instantaneously-consecutive steps: the Dividend amounting to 98.5% of the consideration and \$0.312 per share in cash merger consideration capped at \$200 million.³³ Brookfield had offered \$23 in cash per share plus equity in Brookfield affiliates subject to a 60% cash and 40% equity proration.³⁴ Brookfield's final offer, which was accepted, consisted of \$23.50 per share in cash (capped at \$9.25 billion) and one unit or share of either of two Brookfield affiliates with a 61%/39% cash/equity ratio.³⁵

Defendants' Proxy did not explain why the transaction was structured as 98.5% special dividend and only 1.5% merger consideration.³⁶ While described as

³² *GGP*, 2021 WL 2102326, at *1, 3.

³³ *Id.* at *1.

³⁴ *Id.* at *7.

³⁵ *Id.* at *8.

³⁶ Complaint ¶¶ 4, 208.

a “pre-closing” dividend, the Dividend was actually paid, and comingled with, the merger consideration after the Merger closed.³⁷

³⁷ *Id.* ¶ 208.

ARGUMENT

I. THE COURT OF CHANCERY ERRED IN HOLDING THAT SECTION 262 AND DELAWARE LAW PERMITTED USING THE DIVIDEND AS A MEANS OF EVISCERATING APPRAISAL RIGHTS

A. Question Presented

Did the Court of Chancery err as a matter of law by holding that Section 262 and Delaware law permit a huge special dividend conditioned on a merger when that alters, complicates, and largely eliminates appraisal rights under 8 *Del. C.* § 262?³⁸

B. Scope of Review

The Court of Chancery's construction of Section 262 is a question of law reviewed *de novo* on appeal.³⁹

C. Merits of Argument

1. Section 262 Is Not “An Enabling Statute” But a Mandatory Statutory Right

The Court of Chancery began its determination “that the Transaction’s structure did not violate Section 262” by stating that the appraisal statute should be

³⁸ A891-900 [Plaintiffs’ Answering Brief in Opposition to Defendants’ Motion to Dismiss at 116-25 (Sept. 14, 2020) (Transaction ID 65929144)]; A1093-1104 [Plaintiffs’ Letter Submission in Response to the Court’s December 31, 2020 Letter at 1-12 (Feb. 18, 2021) (Transaction ID 66340298)]; A1012-17, A1071-74 [Transcript of Oral Argument on Defendants’ Motion to Dismiss at 62-67, 121-124 (Nov. 16, 2020)]; *GGP*, 2021 WL 2102326, at *30-33.

³⁹ *M.G. Bancorporation v. Le Beau*, 737 A.2d 513, 524 (Del. 1999).

interpreted based on the principle that “the DGCL is an enabling statute.”⁴⁰ While the DGCL has many enabling provisions, Section 262 is not one of them.

When the statutory remedy of Section 262 applies, the right to appraisal is absolute.⁴¹ The appraisal statute is not “a set of guidelines that may be altered or ignored by a corporation.”⁴² Nor can the Court of Chancery alter the remedy provided by the appraisal statute.⁴³ Contrary to the Court of Chancery’s holding, the mandatory statutory right of appraisal cannot be defeated by “a buyer’s use of a pre-closing dividend in advance of a merger as a means to move consideration from the transacting parties to stockholders.”⁴⁴ The Court of Chancery’s holding that the

⁴⁰ *GGP*, 2021 WL 2102326, at *31. The lower court’s opinion cites two authorities, neither of which supports the proposition that Section 262 is an enabling statute. *Grimes v. Alteon Inc.*, 804 A.2d 256, 266 (Del. 2002) interpreted 8 *Del. C.* § 157, which grants broad powers to issue options and rights. The article the lower court’s opinion cites acknowledges that the DGCL contains statutory mandates. Leo E. Strine, Jr., *The Delaware Way: How We Do Corporate Law and Some of the New Challenges We (and Europe) Face*, 30 *Del. J. Corp. L.* 673, 674 (2005); see also *M.G. Bancorporation*, 737 A.2d at 524-25 (applying “the mandates in Section 262” to review whether the Court of Chancery “acted in accordance with the statutory parameters of Section 262”).

⁴¹ 1 R. Franklin Balotti & Jesse A. Finkelstein, *The Delaware Law of Corporations & Business Organizations* § 9.43 (4th ed., 2021) (hereinafter “Balotti”).

⁴² *Jackson v. Turnbull*, 1994 WL 174668, at *6 (Del. Ch. Feb. 8, 1994), *aff’d*, 653 A.2d 306 (Del. 1994).

⁴³ *In the Matter of the Appraisal of Enstar Corp.*, 604 A.2d 404, 414 (Del. 1992).

⁴⁴ *GGP*, 2021 WL 2102326, at *31.

Dividend was not part of the Merger was inconsistent with *Crawford* and constituted legal error.

2. The Court of Chancery Misinterpreted *Crawford* and Ignored the Step-Transaction Doctrine in Holding that the Dividend Was Not Part of the Merger

The Court of Chancery held the “pre-closing” Special Dividend “in advance of a Merger” was not part of the Merger.⁴⁵ In so holding, the Vice Chancellor ruled *Crawford* was “inapt” because in that case no appraisal rights were granted but Chancellor Chandler held that appraisal rights were required because of “an all cash pre-merger dividend [that] was conditioned on a cashless stock-for-stock merger that would not otherwise have triggered appraisal rights under Section 262.”⁴⁶ The Court of Chancery also distinguished *Crawford* on the erroneous ground that the GGP Proxy disclosed there were appraisal rights.⁴⁷

The Court of Chancery’s analysis of *Crawford* ignored the key holding of the case: that a large special dividend conditioned on approval of a merger is part of the merger for purposes of an appraisal action.⁴⁸ *Crawford* held that the facts there (including the conditional nature of the dividend) “belie the claim that the special

⁴⁵ *Id.* at *31.

⁴⁶ *Id.* at *31.

⁴⁷ *Id.*

⁴⁸ *Crawford*, 918 A.2d at 1191-92.

dividend has legal significance independent of the merger.”⁴⁹ The same analysis applies here. The Court of Chancery simply misread *Crawford* and failed to interpret that precedent correctly.

The facts showing that the GGP Dividend was part of the Merger are actually far stronger than in *Crawford*. Delaware’s merger statute, 8 *Del. C.* § 251(b)(6), requires a merger agreement to describe the cash, rights and securities of other corporations which the holders of shares are to receive in exchange for their stock.

Article II of the GGP merger agreement, entitled “THE MERGER,” describes in Section 2.03 the various elements of the Merger including “(d) The Pre-Closing Dividend.” Section 2.03(d) makes the Dividend a mandatory part of “THE MERGER”:

The Company shall declare a special dividend ...

While the Court of Chancery incorrectly concluded *Crawford* had “a nearly identical deal structure,”⁵⁰ *Crawford* involved a \$6 per share special dividend paid only as a “sweetener” to the primary stock consideration in a stock-for-stock merger to help ward off a competing bid.⁵¹ In contrast, the GGP Dividend included nearly \$9 billion in cash (over \$14 per share) plus a substantial number of securities worth

⁴⁹ *Id.* at 1191.

⁵⁰ *GGP*, 2021 WL 2102326, at *31.

⁵¹ *Crawford*, 918 A.2d at 1183, 1192.

over \$5 billion compared to the less than \$200 million (\$0.312 per share) cash consideration in the Merger.⁵² The Dividend was not just part of the merger consideration – it was nearly all of the merger consideration. Thus, the GGP Dividend, far more blatantly than the supplemental dividend in *Crawford*, was merger consideration “dressed up in a none-too-convincing disguise.”⁵³

In *Crawford*, the Chancellor found that the special dividend “although issued by the Caremark board, is fundamentally cash consideration paid to Caremark shareholders on behalf of CVS.”⁵⁴ The cash and securities in the GGP Dividend came from Brookfield. GGP did not have \$9 billion in cash for the Dividend. As the Court of Chancery acknowledged, Brookfield’s Final Offer included \$9.25 billion in cash (*i.e.* approximately \$9 billion for the Dividend and \$200 million for the per share merger consideration).⁵⁵ The Parent units issued in the Dividend were from Brookfield Property Partners, not GGP. In short, the Dividend was not a

⁵² *GGP*, 2021 WL 2102326, at *13-14.

⁵³ *Id.* at 1192; *see also Gatz v. Ponsoldt*, 925 A.2d 1265, 1280 (Del. 2007) (“It is the very nature of equity to look beyond form to the substances of the arrangement. ‘Equity will not permit one to evade the law by dressing what is prohibited in substances in the form of that which is permissible.’”) (footnotes omitted).

⁵⁴ *Crawford*, 918 A.2d at 1191.

⁵⁵ *GGP*, 2021 WL 2102326, at *8. Brookfield was borrowing over \$14 billion to finance the transaction. A158 [Proxy at 130].

distribution of excess cash that was already in GGP; it was cash and securities from Brookfield.

As in *Crawford*, the payment of the Dividend was dependent on stockholder approval of the Merger. GGP would not file the certificate of designation for the Series B Preferred Stock which would be exchanged for Brookfield's GGP common stock until "the first (1st) business day following receipt of the requisite stockholder approval at the special meeting."⁵⁶ The Notice of Special Meeting defines "the requisite stockholder approval" to include the approval of the certificate and bylaw amendments "together with the merger stockholder approval."⁵⁷ The merger agreement contained the same definition.⁵⁸ The Dividend would only be declared "[f]ollowing the Brookfield affiliate exchange."⁵⁹ That exchange would not occur unless the requisite stockholder approval was received. Therefore, payment of the dividend was dependent on stockholder approval of the Merger.

The Proxy confirms the interrelationship of the Dividend and the merger consideration. The Proxy states that:

⁵⁶ A11 [Proxy, Letter to Stockholders, p. 1].

⁵⁷ A15 [Proxy, Notice of Special Meeting, p. 2].

⁵⁸ A411 [Merger Agreement Section 3.03]. The merger agreement is included as Annex A to the Proxy. *See* A373.

⁵⁹ A11 [Proxy, Letter to Stockholders, p. 1].

The aggregate cash dividend amount will be determined in accordance with the merger agreement.⁶⁰

It acknowledges that any cash consideration “not paid out as part of the pre-closing dividend will instead be paid in the form of merger consideration.”⁶¹ “As of the effective time of the Merger, BPY and GGP will determine the total cash amount” and “then determine the per share merger consideration.”⁶²

3. The Court of Chancery’s Ruling that the Deal Structure Did Not Alter Appraisal Rights Was Legal Error

After holding that Section 262 did not restrict the use of a dividend as a means of transmitting merger consideration,⁶³ the Court of Chancery held that structuring the transaction so that 98.5% of the consideration would be paid as a Dividend would not alter appraisal rights or affect the viability and conduct of an appraisal proceeding.⁶⁴ This was wrong as a matter of law for several reasons.

a. The Dividend Altered the Appraisal Process

Defendants’ structuring of the transaction as a huge Dividend of 98.5% of the consideration and a merger involving only 1.5% fundamentally altered the appraisal rights of GGP stockholders. Section 262’s appraisal process is tied to the “effective

⁶⁰ A35 [Proxy at 7].

⁶¹ A36 [Proxy at 8].

⁶² *Id.*

⁶³ *GGP*, 2021 WL 2102326, at *31.

⁶⁴ *Id.* at *32-33.

date of the merger.”⁶⁵ Under Section 262(h) the fair value appraisal award bears interest from “the effective date of the merger.”⁶⁶ On the “effective date of the merger,” stockholders who demanded appraisal lose their right to vote and “to receive payment of dividends” except dividends payable as of the date “prior to the effective date of the merger.”⁶⁷

Consistent with Section 262, Delaware law requires that “[t]he court must assess the fair value of each share of stock ‘on the closing date of the merger.’”⁶⁸ “Accordingly, the corporation must be valued as a going concern based upon the ‘operative reality’ of the company as of the time of the merger.”⁶⁹ As this Court recently reiterated:

The time for determining the value of a dissenter’s shares is the date on which the merger closes. Thus, if the value of the corporation changes between the signing of the merger agreement and the closing, then the fair value determination must be measured by the “operative reality” of the corporation at the time of the merger.⁷⁰

⁶⁵ 8 *Del. C.* § 262(a), (b)(2)(b), (d)(2), (e), (h), (k).

⁶⁶ 8 *Del. C.* § 262(h).

⁶⁷ 8 *Del. C.* § 262(k).

⁶⁸ *Fir Tree Value Master Fund, LP v. Jarden Corp.*, 236 A.3d 313, 321 (Del. 2020) (quoting *Dell, Inc. v. Magnetar Glob. Event Driven Master Fund Ltd.*, 177 A.3d 1, 20 (Del. 2017)).

⁶⁹ *M.G. Bancorporation*, 737 A.2d at 525; see also Robert S. Saunders et al., 2 *Folk on the Delaware General Corporation Law*, § 262.10 (7th ed. 2021) (hereinafter “Folk”).

⁷⁰ *Brigade Leveraged Cap. Structures Fund Ltd. v. Stillwater Mining Co.*, 240 A.3d 3, 16 (Del. 2020) (footnotes omitted); see also Balotti, § 9.45[A] (“The time for

Therefore, “‘what’ the court is valuing” in an appraisal is the fair value on the closing date of the merger based on the operative reality of the company “as of the time of the merger.”⁷¹

The Court of Chancery acknowledged that under Section 262 the court must determine the GGP shares’ “fair value at the time of the merger.”⁷² If, as the Court of Chancery held, the Dividend was not part of the Merger, the Dividend would be an event between the signing of the Agreement and the closing of the Merger. Thus, GGP’s operative reality at the time of the Merger would be post-Dividend and the fair value determination in an appraisal would be based on the going concern value of GGP post-Dividend.⁷³ In contrast, if, as in *Crawford*,⁷⁴ the Dividend was part of the Merger, GGP’s operative reality would not include the Dividend and fair value would be based on GGP’s pre-Dividend value.

Though Plaintiffs repeatedly raised the step-transaction doctrine as a basis for treating the Dividend and Merger as a single transaction in an appraisal,⁷⁵ the Court

determining the value of a dissenter’s shares is the point just before the merger transaction ‘on the day of the merger.’”).

⁷¹ *Dell*, 177 A.3d at 20 (citing *M.G. Bancorporation*, 737 A.2d at 525).

⁷² *GGP*, 2021 WL 2102326, at *31.

⁷³ *Id.*

⁷⁴ *Crawford*, 918 A.2d at 1183, 1191-92.

⁷⁵ A894-96 [Plaintiffs’ Answering Brief in Opposition to Defendants’ Motion to Dismiss at 119-21]; A1072 [Transcript of Oral Argument on Defendants’ Motion to

of Chancery's opinion does not address that doctrine, which is well-established Delaware law.⁷⁶ As the facts discussed above amply demonstrate, it is far more than reasonably conceivable that Plaintiffs could satisfy one or all of the three separate standards (the binding commitment test, the interdependency test and the end result test) any of which would establish that the Dividend and the Merger were a single transaction under the step-transaction doctrine.⁷⁷ The Court of Chancery erred by failing to consider the step-transaction doctrine and denying Plaintiffs the opportunity to prove the Dividend and Merger were under the doctrine and in equity a single transaction.

b. The Dividend Effectively Eliminated Appraisal Rights for Most Stockholders and Rendered Appraisal Not Viable

The Court of Chancery's holding that the structure of the transaction did not alter appraisal rights also ignores the impact of that structure on whether stockholders would be able to maintain an appraisal action. Defendants' exclusion

Dismiss at 122]; A1094-95, A1097 [Plaintiffs' Letter Submission in Response to the Court's December 31, 2020 Letter at 2-3, 5].

⁷⁶ *Bank of New York Mellon Tr. Co., N.A. v. Liberty Media Corp.*, 29 A.3d 225, 239-41 & nn.20-21 (Del. 2011); *Gatz*, 925 A.2d at 1280 & n.31 (citing doctrine and stating that equity looks beyond form to substance); *Noddings Inv. Grp., Inc. v. Capstar Commc'n, Inc.*, 1999 WL 182568, at *6-7 (Del. Ch. Mar. 24, 1999), *aff'd* 741 A.2d 16 (Del. 1999).

⁷⁷ *Bank of New York*, 29 A.3d at 239-40; *Coughlan v. NXP B.V.*, 2011 WL 5299491, at *7-10 (Del. Ch. Nov. 4, 2011); *Twin Bridges Ltd. P'ship v. Draper*, 2007 WL 2744609, at *8-10 (Del. Ch. Sept. 14, 2007).

of 98.5% of the consideration from any appraisal action effectively eliminated appraisal rights because, given the minimal \$0.312 merger consideration, most GGP stockholders would fall within the *de minimis* exception of Section 262(g).

GGP had 958,392,649 shares of common stock outstanding, 327,053,880 of which were held by Brookfield which would be voting for the Merger and not seeking appraisal.⁷⁸ For the Merger to be approved, more than half of the remaining 631,338,679 shares would have to vote for the Merger and would be ineligible for appraisal.⁷⁹ Two stockholders (The Vanguard Group and BlackRock, Inc.) owned 149,156,100 shares combined, representing 15.7% of the outstanding common shares and 23.6% of the non-Brookfield shares.⁸⁰

GGP had 1,923 holders of record and likely had tens of thousands of beneficial owners.⁸¹ Given the large number of shares held by Brookfield and large institutional holders, the stockholdings of the remaining record and beneficial owners of GGP common stock were relatively small. The holdings of virtually all

⁷⁸ A43, A268, A359-60 [Proxy at 15, 240, 331-32].

⁷⁹ 8 *Del. C.* § 262(d)(1) (only stockholders who have not voted for the merger are eligible for appraisal).

⁸⁰ A359-61 [Proxy at 331-33]. No stockholder other than Brookfield, Vanguard or BlackRock owned more than 5% of the outstanding stock. *Id.* at 332. Only Vanguard and BlackRock had filed 13Gs on GGP. Vanguard, BlackRock and other very large institutional holders like FMR (Fidelity) will generally vote for mergers and not seek appraisal.

⁸¹ A194 [Proxy at 166]; Complaint ¶ 47.

such stockholders would fall below Section 262(g)'s *de minimis* threshold of 1% of all outstanding shares or \$1 million of merger consideration. The Proxy's appraisal notice stated that the Court of Chancery must dismiss any appraisal proceeding unless the shares entitled to appraisal have more than 1% of the outstanding shares or were entitled to merger consideration over \$1 million.⁸² To hold over 1% of GGP's 958,392,649 outstanding common shares, a stockholder would have had to own over 9,583,927 shares. To own \$1 million worth of GGP common stock based on the \$0.312 Merger price, a stockholder would have had to own at least 3,205,129 shares.⁸³ It is reasonably conceivable that the structure of the transaction meant that only a handful of GGP stockholders could meet the criteria for maintaining an appraisal.

The possibility that enough small stockholders would demand appraisal in the hope that an appraisal action would exceed the *de minimis* exception and be financially viable was vanishingly small. Defendants represented that "GGP *did* in fact receive multiple appraisal demands."⁸⁴ They did not reveal the actual number of appraisal demands received, the number of shares included in those demands, the

⁸² A366 [Proxy at 338].

⁸³ In contrast, if the \$9 billion Dividend had been paid as merger consideration, a stockholder owning approximately 87,000 shares would meet the \$1 million threshold.

⁸⁴ DSB at 8 & n.8.

amount of merger consideration attributable to those shares, or whether and how those demands were resolved.⁸⁵ No appraisal action was filed in the Court of Chancery. Defendants' sketchy representation and the absence of any appraisal action makes it reasonably conceivable that only a small number of appraisal demands for a small number of shares were received and an appraisal action could not have been maintained under the *de minimis* exception of Section 262(g).

Even if a stockholder or group of stockholders could meet Section 262(g)'s threshold for maintaining an appraisal proceeding, the structure of the transactions meant they would not have sufficient financial incentive to warrant the substantial expense of prosecuting an appraisal action.⁸⁶ With merger consideration of only \$0.312, the potential additional recovery in an appraisal would not justify the costs and risks of appraisal litigation. The costs in counsel fees, expert fees, filing fees and other expenses of an appraisal action could exceed \$500,000 or even \$1 million.⁸⁷ A stockholder or group of stockholders who owned 3,205,129 shares

⁸⁵ All of these matters would be proper subjects for discovery concerning Defendants' representation if the dismissal of the appraisal claims is reversed.

⁸⁶ Even if some stockholder demanding appraisal could meet the Section 262(g) criteria, Defendants could settle with that stockholder and thereby prevent any remaining stockholder demanding appraisal from maintaining an appraisal action.

⁸⁷ See, e.g., *In re: Appraisal of Dell Inc.*, 2016 WL 6069017, at *5, 9-12 (Del. Ch. Oct. 17, 2016) (awarding over \$4 million in costs of an appraisal action), *rev'd in part on other grounds*, *Dell, Inc. v. Magnetar Global Event Driven Master Fund Ltd.*, 177 A.3d 1, 44-47 (Del. 2017).

entitled to receive \$1 million in merger consideration would not rationally expend hundreds of thousands or even a million dollars when even a recovery of significantly more than the merger consideration might be a breakeven or even a losing proposition.

In short, it is reasonably conceivable that the structure where 98.5% of the consideration was paid in the Dividend eviscerated the appraisal rights of the GGP stockholders by relegating the stockholders to the decision of whether to accept the remaining 1.5% merger consideration or seek appraisal as to whether that 1.5% represented fair value for what remained of their GGP investment. Defendants saddled the GGP stockholders with a Hobson's choice "between accepting the possibly inadequate merger consideration and pursuing a possibly inadequate appraisal remedy."⁸⁸

c. The Court of Chancery's Holding that Stockholders Could Receive the Dividend but Seek Appraisal with Respect to the Combined Consideration Was Legal Error

Adopting arguments from Defendants' supplemental brief,⁸⁹ the Court of Chancery held that "a GGP stockholder seeking appraisal could argue, and the Court

⁸⁸ *In re Best Lock Corp. S'holder Litig.*, 845 A.2d 1057, 1075-76 (Del. Ch. 2001).

⁸⁹ By letter dated December 31, 2020 (Transaction ID 66219962), the Court of Chancery required post-argument simultaneous supplemental submissions on questions relating to Plaintiffs' appraisal claims. The lower court's opinion

could determine under Section 262, that the Pre-Closing Dividend plus the closing consideration undervalued the dissenting stockholder's shares."⁹⁰ Thus, the Court of Chancery ruled that an appraisal proceeding could determine whether the combined Pre-Closing Dividend and per share merger consideration represented the fair value of GGP stock.⁹¹ This was legal error.

The only litigable issue in an appraisal is the determination of the fair value of the petitioner's shares on the date of the merger.⁹² The Court of Chancery cannot expand the statute's limited remedy by invocation of equitable principles.⁹³ The design of the appraisal statute requires the avoidance of such complexities in appraisal proceedings.⁹⁴

The court below further held that:

GGP stockholders seeking appraisal would appear to be better off with the Pre-Closing Dividend in hand than they would be in the typical case, where a dissenting stockholder must forego all merger consideration in order to perfect her appraisal challenge.⁹⁵

essentially adopted Defendants' positions without Plaintiffs having an opportunity to respond to them.

⁹⁰ *GGP*, 2021 WL 2102326, at *32.

⁹¹ *Id.*

⁹² *Cede & Co. v. Technicolor, Inc.*, 542 A.2d 1182, 1187 (Del. 1988); Folk, § 262.01.

⁹³ *Enstar*, 604 A.2d at 414; Folk, § 262.01.

⁹⁴ *Kaye v. Pantone, Inc.*, 395 A.2d 369, 375 (Del. Ch. 1978); Folk § 262.01.

⁹⁵ *GGP*, 2021 WL 2102326, at *32.

As the Court of Chancery admitted, a stockholder must forego all merger consideration or she will lose the right to seek appraisal.⁹⁶ Acceptance of merger consideration is an abandonment of the stockholder's appraisal right.⁹⁷ As this Court has stated:

[T]he basic principle underlying the appraisal statute [is] that an investor make an election either to accept the merger consideration or to pursue an appraisal of his shares. [Citation omitted]. The shareholder cannot attempt to have it both ways.⁹⁸

The Court of Chancery's holding that a GGP stockholder could have it both ways and accept the Dividend without forfeiting her appraisal right was plain error.

The Proxy, however, did not tell the stockholders that an appraisal proceeding would or could determine whether "the Pre-Closing Dividend plus the closing consideration"⁹⁹ represented fair value. Rather, stockholders were told that appraisal would only consider the Merger and only decide whether the per share merger

⁹⁶ *Aspen Advisors LLC v. United Artists Theatre Co.*, 843 A.2d 697, 712 (Del. Ch. 2004) (in a statutory appraisal "the key trade-off inherent in that statutory remedy [is] the required eschewal of the merger consideration."); *In re JCC Holding Co., Inc.*, 843 A.2d 713, 724 (Del. Ch. 2003).

⁹⁷ Folk, § 262.04[B]; Balotti, § 9.43[B].

⁹⁸ *Cede & Co.*, 657 A.2d at 262; *see also Smith v. Shell Petrol., Inc.*, 1990 WL 186446, at *3 (Del. Ch. Nov. 26, 1990) ("Under the Delaware appraisal statute, 8 *Del. C.* § 262, a shareholder deciding to seek an appraisal must forego the merger consideration until after the appraisal action is completed.").

⁹⁹ *GGP*, 2021 WL 2102326, at *32.

consideration paid in the Merger was more, the same or less than the post-Dividend fair value of a GGP share. Thus, if the Court of Chancery’s ruling that the scope of an appraisal proceeding would include the Dividend were correct, then the Proxy was misleading. The stockholder could not receive the Dividend yet still contend that the fair value determination in an appraisal should include the Dividend.

4. The Court of Chancery Committed Legal Error by Dismissing the Appraisal Fiduciary Claim

The Court of Chancery also dismissed Plaintiffs’ claim that the “GGP fiduciaries approved a transaction that was designed to deny GGP stockholders the right to seek appraisal for the full pre-Transaction value of their shares.”¹⁰⁰ The court below rejected Plaintiffs’ claim that “Defendants acted in bad faith by *attempting* to deprive stockholders of their full appraisal rights.”¹⁰¹ Because of that court’s (erroneous) conclusion that GGP stockholders could accept the Dividend and still pursue appraisal¹⁰² the Court of Chancery acknowledged that even if Defendants’ inequitable action in structuring the transaction was legally possible it was not necessarily permissible, for that action must be twice tested: first for, legal

¹⁰⁰ *Id.* at *30-31.

¹⁰¹ *Id.*

¹⁰² *Id.* at *32.

authorization, then second, for equity.¹⁰³ The Court of Chancery held there was no “bad faith” attempt to rob GGP stockholders of appraisal rights.

The Complaint contained detailed allegations that the GGP directors breached their fiduciary duty of loyalty in structuring the transaction to eviscerate appraisal rights.¹⁰⁴ The Complaint repeatedly alleges that the directors’ conduct was deliberate, intentional, unlawful and in bad faith¹⁰⁵ (*i.e.* conduct that is not exculpated under a certificate provision invoking 8 *Del. C.* § 102(b)(7)).

Based on the allegations of the Complaint, it is reasonably conceivable that Plaintiffs could establish through discovery that in structuring the transaction the GGP directors breached their fiduciary duty of loyalty and engaged in acts and omissions that were not in good faith and involved intentional misconduct or a knowing violation of law. The structure did not just involve a relative small special dividend, like the few situations the Court of Chancery cited.¹⁰⁶ Defendants assigned 98.5% of the consideration to the Dividend and only 1.5% to the Merger.¹⁰⁷

¹⁰³ *Id.* n.307 (citing *Schnell v. Chris-Craft Indus., Inc.*, 285 A.2d 437, 439 (Del. 1971); *Bäcker v. Palisades Growth Cap. II, LP*, 246 A.3d 81, 96 (Del. 2021)).

¹⁰⁴ Complaint ¶¶ 4, 209-28, 302-07.

¹⁰⁵ *Id.* ¶¶ 217, 219, 222, 224, 225, 304, 305.

¹⁰⁶ *GGP*, 2021 WL 2102326, at *31 & n.310 (citing *e.g. Crawford*, 918 A.2d at 1191-92; *In re Delphi Fin. Grp. S’holder Litig.*, 2012 WL 729232 (Del. Ch. Mar. 6, 2012)).

¹⁰⁷ Complaint ¶¶ 206(c), 233, 304.

The Proxy does not explain the reason for this unprecedented structure.¹⁰⁸ However, Brookfield's repeated insistence on a condition permitting it to withdraw if there were significant appraisal demands permits an inference that substituting a structure placing 98.5% of the consideration in the Dividend was an alternate way of limiting appraisal demands.¹⁰⁹ Based on the Complaint's allegations, it is reasonably conceivable that GGP's directors acted disloyally and in bad faith by inequitably structuring the transaction to reduce or eliminate appraisal rights.

¹⁰⁸ *Id.* ¶¶ 4, 208.

¹⁰⁹ *Id.* ¶¶ 224, 304; A100-102 [Proxy at 72-74] (appraisal closing condition), A106-109 [Proxy at 78-81] (pre-closing dividend).

II. THE COURT OF CHANCERY ERRED IN ITS MISINTERPRETATION AND MISAPPLICATION OF 8 DEL. C. § 262(d)(1) AND DELAWARE DISCLOSURE LAW

A. Question Presented

Did the Court of Chancery commit legal error by holding that Defendants' Proxy complied with 8 *Del. C.* § 262(d)(1) and Delaware disclosure law?¹¹⁰

B. Scope of Review

The interpretation and application of the mandates of Section 262 present a question of law that is reviewed *de novo* on appeal.¹¹¹ Whether the duty to disclose all material facts relevant to stockholders' decision to choose between the merger consideration and appraisal has been breached is a mixed question of fact and law.¹¹²

C. Merits of Argument

1. The Notice of Appraisal Did Not Satisfy the Requirements of Section 262(d)(1) and Delaware Disclosure Duties

As the Court of Chancery recognized, Section 262(d)(1) required that GGP notify each stockholder entitled to appraisal rights that "appraisal rights are

¹¹⁰ A901-904 [Plaintiffs' Answering Brief in Opposition to Defendants' Motion to Dismiss at 126-129]; A1101-1109 [Plaintiffs' Letter Submission in Response to the Court's December 31, 2020 Letter at 9-17]; A1060-61, A1071-74 [Transcript of Oral Argument on Defendants' Motion to Dismiss at 110-111, 121-124]; *GGP*, 2021 WL 2102326, at *30-33.

¹¹¹ *M.G. Bancorporation*, 737 A.2d at 524.

¹¹² *Shell Petroleum, Inc. v. Smith*, 606 A.2d 112, 114 (Del. 1992).

available.”¹¹³ Corporations must strictly comply with the mandatory statutory notice requirement.¹¹⁴ Providing a description of appraisal rights that is not consistent with Delaware appraisal law or even providing an incomplete or inaccurate version of Section 262 will render the notice invalid and violate Section 262(d)(1).¹¹⁵ The failure to provide a proper and correct notice of appraisal is a material statutory violation that gives rise to an appropriate remedy, including a quasi-appraisal remedy.¹¹⁶

The purpose of a Section 262(d)(1) appraisal notice is to enable stockholders to decide whether to accept the merger consideration or to exercise their appraisal rights.¹¹⁷ Stockholders must be given complete and accurate information material to the decision.¹¹⁸ The statutory mandate of Section 262(d)(1) requires telling the stockholders the scope of the appraisal rights that are available. No information concerning appraisal rights is more material than what appraisal rights are available

¹¹³ *GGP*, 2021 WL 2102326, at *32 & n.315. *See also* Folk, § 262.03; Balotti, § 9.44[A].

¹¹⁴ *Berger*, 976 A.2d at 135-36 & n.5; *Turnbull*, 1994 WL 174668, at *5-6; *Nebel v. Sw. Bancorp, Inc.*, 1995 WL 405750, at *6 (Del. Ch. July 5, 1995); Balotti, § 9.44[A]; Folk, § 262.03.

¹¹⁵ *Nebel*, 1995 WL 405750, at *7; *Mehta v. Mobile Posse, Inc.*, 2019 WL 2025231, at *5-7 (Del. Ch. May 8, 2019).

¹¹⁶ *Nebel*, 1995 WL 405750, at *7; *Mehta*, 2019 WL 2025231, at *6.

¹¹⁷ *Nebel*, 1995 WL 405750, at *7; *Mehta*, 2019 WL 2025231, at *7; *Gilliland v. Motorola, Inc.*, 859 A.2d 80, 86 (Del. Ch. 2004).

¹¹⁸ *Berger*, 976 A.2d at 138.

and will be determined in the Section 262 proceeding. Misleading, incomplete or inaccurate information in the appraisal notice concerning appraisal rights renders the notice invalid and in violation of Section 262(d)(1).¹¹⁹

The notice of appraisal in the Proxy did not accurately inform the GGP stockholders of the appraisal rights that were available. It told them that appraisal rights were limited to the Merger (excluding the Dividend) and that an appraisal proceeding would only determine whether fair value post-Dividend was greater than, the same as or less than the \$.0312 merger consideration. The Proxy's description of appraisal rights was wrong as a matter of law in light of *Crawford*.

The Court of Chancery's holdings that (i) the Dividend would have been a relevant factor in an appraisal, (ii) the appraisal judge could consider "the Transaction as a whole" in determining fair value and (iii) an appraisal could determine whether the "Dividend plus the closing consideration" represented fair value¹²⁰ are inconsistent with the Proxy's description of the available appraisal rights. The Court of Chancery's conclusion that the Proxy's description of appraisal rights as limited to the Merger and excluding the Dividend was "sufficient" cannot be squared with its holding that the Dividend would have been included in the appraisal valuation.

¹¹⁹ *Mehta*, 2019 WL 2025231, at *6-7.

¹²⁰ *GGP*, 2021 WL 2102326, at *31-32.

2. The Proxy Clearly and Repeatedly Said Appraisal Rights Applied Only to the Merger and Cash Merger Consideration

The Proxy said it constituted “a formal notice of appraisal rights under Section 262 of the DGCL.”¹²¹ It told the GGP stockholders that appraisal rights were limited to the Merger:

GGP common stockholders are entitled to exercise appraisal rights solely in connection with the merger.¹²²

It further stated that stockholders perfecting appraisal “shall not receive the merger consideration.”¹²³ The Proxy identifies the \$0.312 in cash received in the merger as “the per share merger consideration” and specifies that stockholders perfecting appraisal rights would “receive in lieu of the per share merger consideration a cash payment equal to the fair value of their GGP common stock,” which might be “greater than, the same as or less than the per share merger consideration.”¹²⁴

The Proxy defines “merger consideration” as “the per share merger consideration multiplied by the merger share number.”¹²⁵ It says that:

¹²¹ A363 [Proxy at 335].

¹²² A43 [Proxy at 15]. *See also* A13 [GGP Letter to Stockholders in Proxy (third page)] which states “GGP common stockholders are entitled to appraisal rights solely in connection with the merger.”

¹²³ A43 [Proxy at 15].

¹²⁴ A60 [Proxy at 32].

¹²⁵ A22 [Proxy at vi]. The “merger share number” is defined as GGP’s outstanding common shares immediately prior to the Merger. *Id.*

“per share merger consideration” refers to an amount of cash equal to the quotient of **(i) \$9,250,000,000** less (a) the aggregate cash ... to holders of common units of GGPOP ... less (b) the aggregate cash payment ... to holders of the class of units designated under the GGPOP partnership agreement as “LTIP units,” ... less (c) the aggregate cash consideration to be paid with respect to shares of GGP restricted stock ... **less (d) the aggregate cash dividend amount**, divided by (ii) the merger share number;¹²⁶

The definition of Per Share Merger Consideration in Section 1.01 of the merger agreement as used in Section 2.07(a)(i) to describe the Merger is essentially the same as in the Proxy when tracked through the definitions of “Merger Consideration Amount,” “Pre-Closing Dividend Share Number,” “Total Cash Amount,” and “Aggregate Cash Dividend Amount” found in Section 1.01: \$9,250,000,000 less various amounts, including the amount of the cash portion of the Dividend. Thus, contrary to the Court of Chancery’s view that the definition of merger consideration could have been more clearly defined,¹²⁷ the definition was clearly and carefully drafted to exclude the Dividend.¹²⁸

¹²⁶ *Id.* (emphasis added).

¹²⁷ *GGP*, 2021 WL 210326, at *33.

¹²⁸ The Court of Chancery dismissed as a mere “quibble” the Proxy’s inconsistent disclosure that the available appraisal rights would determine whether fair value of the GGP shares was “more than, less than or the same as the consideration to be received in the Transactions,” which would include both the Merger and the Dividend. *Id.* at *32 (discussing A114 [Proxy at 86]).

The Election Form sent to GGP stockholders confirmed that “[a]ppraisal is only available with respect to the Merger Consideration,” not the Dividend.¹²⁹ The form refers stockholders back to the Proxy section on Appraisal Rights, which states that the appraisal rights only apply to the \$0.312 per share cash merger consideration.

3. The Court of Chancery’s Erroneous Interpretation of Section 262(d)(1)

The Court of Chancery erroneously interpreted Section 262(d)(1) as only requiring a vague statement that there are appraisal rights, with no description of what appraisal rights are available.¹³⁰ The Court of Chancery held that the Proxy did not “misleadingly imply[] that *only* the post-dividend payment (comprising a small proportion of the overall consideration) was subject to appraisal.”¹³¹ The Proxy did not just “imply” that appraisal would be limited to the cash merger consideration; it expressly, directly and repeatedly said so.¹³²

Defendants’ notice of appraisal told the stockholders the appraisal process would be limited solely to the Merger. While the Court of Chancery suggested that

¹²⁹ *GGP*, 2021 WL 210326, at *32 n.321. The Court of Chancery said the form did not mislead stockholders because it was sent after the stockholder vote. *Id.* However, the form confirms that in the Proxy, which was sent to the stockholders prior to the vote, Defendants told stockholders that appraisal rights were limited to the Merger.

¹³⁰ *Id.* at *32.

¹³¹ *Id.*

¹³² *E.g.*, A43, A60, A363, A366 [Proxy at 15, 32, 335, 338].

the Dividend might be relevant in an appraisal, the Proxy did not mention that possibility, though Defendants and their sophisticated counsel were certainly aware of *Crawford*. The stockholders were not told the appraisal determination might include the Dividend; they were told it definitely would not.

The Court of Chancery held that Defendants' notice stating that the stockholders were either to accept the merger consideration or forfeit that payment and seek appraisal limited solely to the merger was "sufficient," and that Defendants were not required to provide legal advice or engage in "legal hypotheticals."¹³³ This was legal error.

First, as shown above, in light of *Crawford*, the notice was not an accurate statement of the available appraisal rights.

Second, Delaware law does require Defendants to provide legal advice concerning the appraisal rights available to stockholders. Delaware law requires both notice of available rights and specific instructions concerning the appraisal process.¹³⁴ Those twin requirements include giving the stockholders a description of the appraisal rights they can exercise and the scope of an appraisal proceeding.

¹³³ *GGP*, 2021 WL 2102326, at *32-33.

¹³⁴ 8 *Del. C.* § 262(d)(1); *Raab v. Villager Indus., Inc.*, 355 A.2d 888, 895 (Del. 1976); *Mehta*, 2019 WL 2025231, at *11 & n.87; *Andrew and Suzanne Schwartz 2000 Family Tr. v. AM Apparel Hldgs., Inc.*, 2008 WL 2877804, at *7 & n.26 (Del. Ch. July 28, 2008).

Thus, the Court of Chancery’s holding that there was no obligation under Delaware law to provide the GGP stockholders with legal advice concerning their appraisal rights was legal error.

Third, Defendants admitted they were required to provide legal advice by including in the Proxy five pages of legal advice concerning the stockholders’ appraisal rights, including two pages on “Determination of Fair Value.”¹³⁵

Fourth, having made partial disclosure concerning appraisal rights, Defendants were required to give a full and accurate summary.¹³⁶ Defendants advised the GGP stockholders that appraisal rights were limited to the Merger and that the appraisal award might be more, less or the same as the merger consideration. Having traveled down the road of partial disclosure by giving advice on the scope of available appraisal rights and an appraisal proceeding, Defendants were required to give a full and fair summary, including at a minimum the further disclosure that under *Crawford* the Dividend might be part of the Merger. The Court of Chancery’s finding that legal advice pertinent to the stockholders’ consideration of “whether to exercise their appraisal rights ... necessarily would have entailed evaluating the role

¹³⁵ A363-67 [Proxy at 335-39].

¹³⁶ *Morrison v. Berry*, 191 A.3d 268, 272 (Del. 2018) (“partial and elliptical disclosures’ cannot facilitate the protection of the business judgment rule...”). *Zirn*, 681 A.2d at 1053, 1056-57 (partial disclosure of legal advice concerning patent reinstatement prospects was materially misleading); *Arnold v. Soc’y for Sav. Bancorp, Inc.*, 650 A.2d 1270, 1280 (Del. 1994);

of the Pre-Closing Dividend”¹³⁷ confirms that the Proxy’s discussion of appraisal rights was materially misleading and incomplete. Therefore, the lower court’s holding that the Proxy’s disclosure was “sufficient” was an error of law.

¹³⁷ *GGP*, 2021 WL 2102326, at *32.

CONCLUSION

For the reasons stated above, the dismissal of Plaintiffs' claims relating to appraisal should be reversed and the case remanded for prosecution of those claims.

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